IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 1875 of 2005

HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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AMEENABIBI HABIB RASOOL & 1 - Applicant(s)
Versus
THE STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR MM TIRMIZI for Applicant(s) : 1 - 2.
MR KAMAL B. TRIVEDI, ADVOCATE GENERAL with MS SANGEETA VISHEN, AGP, for Respondent(s) : 1
MR YN RAVANI for Respondent(s) : 2

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CORAM : HONOURABLE MR.JUSTICE KS JHAVERI

Date : 08/12/2006

ORAL JUDGMENT

1.0 When the matter is taken up for hearing today, a draft amendment has been submitted in the matter in court praying for directions to transfer the investigation of the offence registered as CR No.13/2002 with Khanpur Police Station along with offence registered as CR No.I 11/2002 with Khanpur Police Station, Panchmahals to CBI; direction to respondent no.1 to return the skeletons to the respective relatives in presence of CBI and to allow dignified burial; direction to respondent no.2 to investigate the still missing bodies related to the offence that occurred in Pandarwada between 28th February and 3rd March 2002 and to direct the respondents to ensure prevention of intimidation and harassment of the victims in connection with the aforesaid complaints. Though substantial prayers have been sought, no supporting facts are stated nor are the same affirmed by the petitioners. An attempt has been made to enlarge the scope of petition and delay the hearing which was not desirable. Therefore the draft amendment has been rejected.

1.1 Thereafter, during the hearing of the matter same draft amendment was submitted by affirming the same. However, even in this amendment also no facts are stated to support the prayers. Hence the draft amendment is rejected.

2.0 The petitioners herein had prayed for directions to transfer the investigation of C.R.No.I 11 of 2002 registered with Khanpur Police Station, Lunavada to CBI; to seal the unearthed remains of the deceased in the presence of the relatives treating them as panch

witnesses and to send the same for DNA testing to Red Hill, Hyderabad Forensic Laboratory and to direct that an FIR be registered with the relatives of the deceased as complainants about the unearthing of the remains. As stated above by way of draft amendment the petitioners have prayed to transfer the investigation of the offence registered as CR No.12/2002 with Khanpur Police Station along with the offence registered as CR No.I 11/2002 with Khanpur Police Station, Panchmahals to CBI; to direct the respondent no.1 to return the skeletons to the respective relatives in presence of the CBI for a dignified burial; to direct the respondent no.2 to investigate the still missing bodies related to the offence occurred in Pandarwada between 28th February 2002 and 3rd March 2002 and to direct the respondents to ensure prevention of intimidation and harassment of the victims and human rights defenders associated to the offences registered as C.R. No.I 11/2002 and 13/2002 with Khanpur Police Station, Panchmahals.

3.0 The short facts which led to filing of the present petition are as under:

3.1 In pursuance of the incident known as Godhra carnage, a mob of 5000 to 6000, armed with swords and dharias came to the village of petitioner no.1. Petitioner no.1 along with others ran to the field and hid themselves behind hay stacks. The mob set fire to the dry grass. Thereupon the petitioner no.1 and others started running to escape from the mob. However, the mob caught hold of various persons and killed them. After the incident the Sarpanch and others made petitioner no.1 and others to pick up nine dead bodies and dump them into one of the vehicles. Petitioner no.1 and others were taken away in another vehicle and petitioner no.1 was told that the dead bodies would be brought to

them. The vehicle carrying the dead bodies went to Lunawada side and thereafter they had never seen the dead bodies.

3.2 On 27th December 2005 petitioner no.2 came to know that certain dead bodies were buried on the bank of river Panam, Lunawada. Petitioner no.2 and others went to the site and dug out the dead bodies. According to the petitioners, after unearthing the dead bodies the police is required to follow the procedure as envisaged under section 174 and 176 of CrPC.. On 1st March 2002 the police had sent the dead bodies to the hospital for post mortem and thereafter the dead bodies have been disposed of. However, on 27th December 2005 when the dead bodies were taken out, the clothes worn by the deceased were the same as they were wearing at the time of the incident when they were alive. Had the postmortem been performed, the doctors would have covered the dead bodies with white clothes in accordance with law. The police was also required to draw Panchnama of the clothes of the deceased. However, when the dead bodies were unearthed, the bodies were found with same clothes which they had worn on 1st March 2002. Therefore, the petitioners apprehend that the police would not carry out the investigation properly and the same is required to be handed over to CBI. Accordingly the present petition has been filed.

4.0 In view of the aforesaid prayers, this Court after discussing the matter at length, on 29th December 2005 issued the following directions:

> "8. In view of above, it is hereby ordered by way of an interim arrangement that in presence of responsible officers of CBI, sample from each deadbody digged out and at present lying out, be taken and sample be sealed and sent to Red Hill Laboratory, Hyderabad for analysis and DNA testing along with the samples drawn in same manner of

from the body of the close relatives of the deceased. The report of test, in turn be sent to CBI and copy thereof be sent to this Court. CBI may be assisted actively by the State Police so that the things can take shape smoothly and exercise is completed smoothly. If the State machinery so desires, may give the case papers of exercise that has undertaken by the State machinery to CBI, otherwise details can be scrutinized by this Court while passing further orders in the matter. It will be open for the State or close relatives of the deceased to put and bury the dead bodies either by themselves or they can be buried by State machinery as per the norms adopted by such machinery. While drawing samples from the body of the close relatives, the Officer from State Police shall remain present so that identity of the person from whom sample is drawn should not, in any way, be under confused state. Order and directions accordingly.

9. Copy of this order can be served to the CBI at its appropriate office i.e. either at Bombay or at Delhi."

4.1 Thereafter on 12th January 2006 this Court passed the following order:

2. Heard Mr.M.M. Tirmizi, learned counsel appearing for the petitioners; Mr.K.B. Trivedi, learned Additional Advocate General, appearing on behalf of the respondent no.1-State and Mr.Nigam R. Shukla, learned counsel appearing for the respondent no.2-CBI.

2. After detailed deliberations made by Mr.K.B.Trivedi, learned Additional Advocate General for respondent no.1-State and Mr.N.R. Shukla for the respondent no.2-CBI, further clarificatory orders are required to be passed to avoid confusions which have been cropped on account of ground realities found at the spot when the respondent no.2-CBI proceeded to collect the samples in compliance of the order passed by this Court on 29th December, 2005.

3.It emerges from record that some of the buried dead-bodies were dug out on or about 27th December, 2005, but

they were again reburied. So the day on which this Court has passed the order i.e. on 29th December, 2005, no dead-body/ skeleton was lying on the ground and, therefore, considering the spirit of the order passed by this Court, the respondent no.2-CBI has collected the samples from the burial ground with the help and assistance of the State machinery. The responsible officers, including the Executive Magistrate, were also present. The Court is informed that all the dead-bodies/skeletons recovered are now kept in the form in which they were found, in separate containers.

4. The wish of the respondent no.2-CBI as expressed by Mr.Shukla is that all the containers should be taken to the laboratory at Hyderabad for DNA test because such test may need all the remains of the body/skeleton. At present the question of identity of the persons deceased is not a matter of dispute. The Court is informed that the Executive Magistrate has also put his seal on each container and Mr.M.M. Tirmizi has also no objection if all such containers are taken for appropriate test to the laboratory at Hyderabad. Total there are 9 (nine) containers of the dead-bodies/skeletons of the persons deceased and they are sealed by the Executive Magistrate. So all these 9 (nine) containers shall be carried to the concerned laboratory for analysis. Total 57 close relatives of the persons declared dead have given their blood samples. The same are drawn by the team headed by Dr.Dogra, Chief of Forensic Science, All India Institute of Medical Sciences, New Delhi, to the satisfaction of the respondent no.2-CBI. These blood samples were drawn in presence of local doctors of the Health Department of the State and also officials of other departments. So if the respondent-State desires to apply its own seal on this container, the responsible officer or the Executive Magistrate can put his seal on this container. Therefore, all the ten containers containing samples of blood and bodies/skeletons be examined by the Centre for DNA Finger Printing and Diagnostics (CDFD) situated at Hyderabad, instead of Red Hill Laboratory at Hyderabad. Mr.M.M. Tirmizi, learned counsel appearing for the petitioners, has fairly accepted that the petitioners have no objection if the said samples are examined by the

laboratory named in the reply affidavit filed by the respondent no.2-CBI. The anxiety of the respondent no.1-State is also found valid that a copy of the report of CDFD may also be given to the State. So now the CDFD Laboratory Authority is directed to prepare and send its report in three copies, preferably shall see that all the three are signed originally by the concerned officer to (i) Registry of this Court; (ii) respondent no.2-Superintendent of Police, Central Bureau of Investigation, Special Crime Branch, Mumbai and (iii) Secretary, Home Affairs, State of Gujarat, Gandhinagar.

5. It is rightly submitted by Mr.N.R.Shukla, learned counsel appearing for the respondent no.2-CBI, that as the State machinery has cooperated while collecting the samples, etc. it may further help the CBI in taking the containers to the concerned Laboratory i.e.CDFD at Hyderabad by deputing responsible officers and infrastructural requirements. The State shall take appropriate decision in this regard and shall see that the samples are carried safely to the laboratory i.e.CDFD.

6. After analysis of DNA Finger Printing, the dead-bodies/ skeletons be brought back at the place from where the same are being taken and this Court thereafter shall pass appropriate further orders as to reburial of these dead-bodies/ skeletons after the submissions that may be made before this Court. So now the dead-bodies/ skeletons in question shall not be handed over directly to the relatives till further orders that may be passed by this Court.

7. A copy of this order/writ be served to the Director, CDFD, Hyderabad through any responsible officer of the respondent no.2-CBI.

8. It is hereby clarified that earlier this Court and the counsel appearing for the parties were under impression that all the dead-bodies/ skeletons were lying on the ground and they have been dug out. But in reality, the dead-

bodies/skeletons were not on the ground but they were buried and, therefore, the CBI collected the samples by taking out these dead-bodies/ skeletons in view of the spirit of the order passed by this Court and the State Machinery has co-operated with the exercise and the petitioners were also present when these samples were collected.

9. It is clarified that none of the petitioners or relatives of the persons deceased or the office bearers of the petitioner no.2 shall travel with the dead-bodies/skeletons to the laboratory at Hyderabad. The petitioners and/or any of their office bearers will have no say till the dead-bodies/ skeletons are received from the concerned laboratory after due analysis/test. The matter is adjourned to 10th February, 2006.

Direct Service to the parties is permitted. A copy of this writ be handed over to the respondent no.2-CBI also so that the same be served to the Director, CDFD, Hyderabad."

5.0 Mr. Tirmizi, learned Advocate for the petitioners submitted that in view of the DNA report, further investigation is required to be carried out by CBI. He submitted that there were several discrepancies in the investigation carried out by the State Police Authorities and therefore it would be appropriate if the investigation is entrusted to CBI. He submitted that the presence of original clothes on the skeletons of the dead would go to show that post mortem was not performed by the State Authorities and the CBI was also not permitted to do so. He further submitted that the fact that the bodies were buried in forest land and not on waste land also would go to show that the Authorities want to hush up the matter.

5.1 Mr. Tirmizi submitted that there are many lapses on the part of the State Authorities in the investigation which are required to be viewed

very seriously. According to him, the affidavits filed by the relatives of the victims are not controverted and the State Authority has tried to help the accused by not taking proper action in the matter. Thus, the submission of the petitioners is that the matter requires further investigation and as the State Government has tried to help the accused, the police authority had not conducted the investigation properly and therefore, this is a fit case to transfer the investigation to CBI.

5.2 In support of his contentions, Mr. Tirmizi has relied upon a decision in the case of State of Bihar and Another V.Ranchi Zila Samta Party and Another, reported in 1996(102) CRLJ 2168 SC wherein also the question arose as to whether the investigation is required to be transferred to CBI. On the facts of that case the Apex Court ordered that the investigation be entrusted to CBI and CBI was directed to take over the investigation already made by the State Police.

5.3 Mr. Tirmizi has also relied upon a decision in the case of Mohan Lal Sharma V. state of U.P. reported in 1989(2) SCC 600, wherein in case of police lock up death, and inquiry conducted by City Magistrate having been found unsatisfactory, the case was directed to be referred to CBI.

5.4 He has also relied upon the decision in the case of Central Bureau of Investigation Vs. state of Rajasthan, reported in 2001(3) SCC 333 wherein it is held that the Supreme Court under Articles 32 and 142 and High Court under Article 226 can, in certain cases, direct CBI to conduct investigation into any offence, but the power has to be exercised sparingly.

5.5 Mr. Tirmizi has pointed out certain irregularities in the investigation at earlier point of time and the affidavits filed in the year 2005 and stated that in view of the same the inquiry is required to be transferred to CBI.

5.6 Mr. Trimizi has also relied upon a decision in the case of Central Bureau of Investigation Vs. State of Rajasthan reported in (2001)3 SCC 333 wherein it is held that a Magistrate under section 156(3) has no power to direct CBI to conduct investigation into any offence.

6.0 Mr. Kamal Trivedi, learned Advocate General submitted that no case is made out to transfer the investigation to CBI and this petition requires to be rejected. He submitted that the sole purpose of filing the present petition is to give unnecessary publicity and reviving the fading issues which are otherwise being given hiatus and/or being under active consideration in various pending proceedings.

6.1 According to Mr. Trivedi the petition itself is misconceived on various grounds to the effect that the petitioners have not provided that they have personal knowledge about various alleged grievances made on behalf of several individuals. He submitted that the concerned persons including the associates of petitioner no.2 should have approached the competent authorities instead of straightaway exhuming the skeletons on their own without the permission of the competent authority.

6.2 Mr. Trivedi submitted that petitioner no.2 has no locus standi to file the present petition under the guise of espousing the cause on

behalf of the petitioner no.1 and others as the petitioners are not authorized to do so and no fundamental rights of the petitioner no.2 has been abridged or infringed.

6.3 According to Mr. Trivedi the petitioners ought to have filed an appropriate application before the appropriate court inasmuch as the regular proceedings arising out of CR No.I 11 of 2002 are very much pending before different courts. He further submitted that the petitioners have not come to this Court with clean hands and therefore they are not entitled to any relief.

6.4 Mr. Trivedi submitted that there is a gross delay in the matter inasmuch as the petitioners ought to have come forward to claim the dead bodies in the year 2002 itself as was done by the relatives claiming dead bodies in connection with another offence registered as CR No.13 of 2002.

6.5 Mr. Trivedi further contended that initially charge sheet was filed and trial had begun against 23 accused persons. Out of 23, 11 persons were acquitted by the trial court on 29.10.2002 against which appeal has been preferred before this Court which is pending. The State has made an application under section 173(8) of the Criminal Procedure Code in the matter before the learned Judicial Magistrate, First Class, which was rejected. Against the said order the State has preferred a revision application which is pending. He submitted that during the pendency of the said revision application before the Court of Sessions, Godhra, after having informed the Sessions Court, the investigating agency started further investigation in the matter under section 173(8) of Criminal Procedure Code. He submitted that as a result of further

investigation, two more persons have been booked and two more are likely to be booked. He further submitted that the trial court had acquitted 8 accused persons against which appeals have been preferred by the State Government.

6.6 Mr. Trivedi pointed out that the earlier order passed by this Court on 28.12.2005 only refers that if needed the CBI can approach this Court. The CBI received the DNA Report, which was conducted at Hyderabad and not at Gandhinagar. The report was submitted way back in May 2006 and till today they have not approached this Court for transferring the case.

6.7 According to Mr. Trivedi, as per the DNA report, the skeletons of the dead bodies have completely been contaminated because of microbial bacterial contamination and therefore the DNA test was not feasible on the skeletons. Though identification was difficult, dead bodies of 6 individuals have been identified.

6.8 Mr. Trivedi submitted that further investigation is being conducted as per the provisions of section 173(8) of CrPC. He, therefore, submitted that there is no lapse on the part of the State Government or the Police Authorities in carrying out the investigation and therefore no case is made out to hand over the investigation to CBI. He has further submitted that no application is made to the concerned authority to transfer the investigation till this date and unless such a request is made and rejected, the petitioners cannot approach this Court for the said relief. He, therefore, submitted that the petition deserves to be rejected.

6.9 In support of his contentions Mr. Trivedi relied upon a decision in the case of All India Institute of Medical Sciences Employees Union

(Regd.) V. Union of India and others, reported in (1996) 11 SCC 582 wherein it is held that if no action is being taken by the police authority, the complainant can file a complaint before the Magistrate having jurisdiction to take cognizance of the offence and the complainant is not entitled to approach the High Court by filing a writ petition and seeking a direction to conduct an investigation by CBI.

6.10 He has relied upon a decision in the case of State of Maharashtra and others V. Sheela Ramesh Kini and others, reported in (1998)9 SCC 346 wherein it is held that merely because the crime has generated immense amount of public interest or a public outcry, that cannot be a good ground for transfer of a case from CID to CBI.

6.11 Mr. Trivedi has relied upon a decision in the case of State of Karnataka Vs. Arun Kumar Agarwal and others, reported in (2000)1 SCC 210, wherein it is held that High Court was not justified in directing the State Government to get an investigation done through CBI when neither specific crime nor persons involved in the crime nor place of crime is known.

6.12 Mr. Trivedi has also relied upon Tests in Criminal Investigation, Trial and Paternity Disputes published by Alia Law Agency, Lucknow, wherein it is stated that in case of contamination, DNA test is a problem, any small amount of contaminated DNA may give false or misleading results and the only option to avoid it is the use of control sample and careful interpretation. It also states that if DNA molecule is contaminated, it may produce false or misleading results.

6.13 Mr. Trivedi submitted that the dead bodies were buried in survey no.69 on the banks of the river “Paanam”. Petitioner no.1 and other

victims have alleged that the said land is “forest land” as per the 7/12 village form and that therefore, according to them, the local administration ought not to have buried the dead bodies without handing over the same to the survivors of the deceased. However, according to Mr. Trivedi, no survivors had come forward to claim dead bodies at that time and hence the same were handed over to local authorities,before whom also nobody had come forward.

7.0 Mr. Yogesh N. Ravani, learned Advocate, appearing for respondent no.2 CBI submitted that he has not been given any instructions in the matter for further investigation and if this Court directs CBI, the CBI will investigate into the matter. This statement has been made in spite of the direction issued to CBI on 28th April 2006.

8.0 As a result of hearing and perusal of the record, it is apparent that all along the arguments the main emphasis in the contention of the learned Advocate for the petitioners is to transfer the investigation of CR No.I 11/02 to CBI because of the approach of the police authorities in handling the dead bodies in March 2002. In support of this proposition affidavit in rejoinder of petitioner no.1 dated 8.2.2006 was read very extensively. Various other affidavits of several individuals were also read over in support of the submission that though the relatives had demanded the dead bodies, no response was ever given by the administration.

8.1 As against this submission, on behalf of the state it was contended that all the bodies in question were in fact identified by the villagers concerned and thereafter they were handed over to Lunawada Nagarpalika for burial as per the provisions of section 87(k) of the

Gujarat Municipalities Act, 1963, since none of the relatives had, at that time, come forward to claim the said bodies and hence the provisions of Police Manual with reference to unidentified bodies were not required to be complied with in the present case. Reliance has been placed on behalf of the State on its affidavit in sur-rejoinder dated 21.2.2006 while responding to the submissions of the petitioners. The prayer for transfer made in the amendment could not be granted in view of the fact that the matter is pending by way of subsequent complaint where the relatives had come forward claiming 8 dead bodies which were exhumed and given back to them after complying with the required procedural formalities and that therefore it has no connection with the prayer made in this petition.

8.2 Considering the overall facts of the case, it would be difficult to believe the version of the petitioners that the relatives of the deceased persons in Cr. No.I-11/2002 were not aware about their relative victims and their burial place, more particularly when in C.R. No.I-13/2002 the relatives of 8 persons whose dead bodies were buried along with the 20 dead bodies concerned in C.R. No.I-11/2002 had come forward as aforesaid, after 4 months i.e., in July 2002 before the Sub Divisional Magistrate for claiming the bodies of the deceased. The concerned authorities, after following the necessary formalities, had handed over the said 8 dead bodies to their respective relatives. I am therefore of the view that the same course of action could have been followed by the petitioners and other relatives in the present case also, but it appears that instead of doing that, the said relatives along with the office-bearers of the petitioner no.2 exhumed the 20 dead bodies on 21.12.2005 in the presence of electronic media and made an allegation that the investigation has not been properly carried out. However, I am

not expressing any opinion on this issue since any observation which may be made by this Court may prejudicially affect the complaint filed by the Sate against which a petition is preferred and the same is pending.

8.2 Another ground on which the petitioners seek transfer of investigation to CBI is the DNA report dated 3.5.2006 of Centre for DNA Fingerprinting And Diagnostics i.e. CDFC, Hyderabad given pursuant to the interim order dated 29.12.2005 passed by this Court. The said report came to be placed before this court pursuant to the order dated 24.11.2006. The contention of the petitioners is that as per the said DNA report, analysis of only six DNA profiles prepared from skeletal remains could match with the DNA profiles prepared from blood samples of living individuals and that, therefore, it proves that remaining skeletons of 14 bodies were not that of the deceased victims of C.R. No.I 11/2002 and hence 14 persons who died in 2002 during the course of the riot are missing and therefore this aspect would call for transfer of investigation to CBI. For this purpose, the petitioners very vehemently relied upon the following observations of this Court in the interim order dated 29.12.2005:

> "... But if it is found that dead bodies or any one of such dead bodies is not accounted for in connection with any of two earlier incidents, then it may lead to new case and, therefore, the scope to investigate the crime de-novo qua that is there ..."

As against the aforesaid submission of the petitioners, it was contended on behalf of the State that it was a misreading of DNA report by the petitioners. According to the State, CDFD, Hyderabad, could do the matching only in six cases since such a matching was not possible in the remaining cases because of degradation and decomposition of the

dead bodies, more particularly in view of bacterial contamination in DNA. In this connection Mr. Trivedi has relied upon the following portion of the said DNA report:

> "Analysis of all the DNA preparations from skeletal remains indicated overwhelming microbial (bacterial) DNA contamination rendering the task of amplifying and testing the human DNA profiles are challenging one."

In support of the above submission, reliance was placed on behalf of the State on the following excerpts from the refrence book entitled "DNA TESTS IN CRIMINAL INVESTIGATION, TRIAL AND PATERNITY DISPUTES" by Yaspal Singh and Mohd. H. Zaidi, 2006 edition.

> "Contamination is another problem. Any small amount of contaminated DNA may give false or misleading results.
>
> If DNA molecule is contaminated, it may produce false or misleading results."

In view of the above, I am of the view that the manner of reading of DNA report by the petitioners cannot be said to be proper and logical and I find substance in the above contention of the State.

8.3 Thus, from the perusal of the record, certain facts are undisputed. The incident in question in the present case took place on 27.2.2002 pursuant to which FIR being C.R. No.I-11/2002 came to be registered and investigation came to be commenced. During the course of investigation in all 23 accused came to be arrested for the alleged offence punishable under sections 302, 307, 147, 148 and 149 of IPC, who ultimately came to be charge-sheeted. According to the affidavit in reply dated 9.1.2006 filed on behalf of the State, out of the said 23 accused, 11 persons came to be acquitted by the trial Court on 29.10.2002 against which, the State has filed appeals in this Court

which are still pending. The case against 12 accused is pending before the Sessions Court at the stage of examination of witnesses. At this stage the Investigating Officer filed an application for further investigation in the Court of Judicial Magistrate, First Class, on 23.10.2003 which came to be rejected by the Court on 18.12.2003. Against the said order of rejection the State preferred Revision Application in the Court of Sessions, Godhra, which is pending as on date. During the pendency of the said revision application the Investigating Officer submitted a further application dated 22.9.2004 in the Court stating therein that further investigation is being carried out under section 173(8) of CrPC and that during the said further investigation, statements of 130 witnesses came to be recorded and Test Identification Parade was conducted, as a result of which, one more charge-sheet dated 22.12.2005 came to be filed. In pursuance of the said chargesheet two more accused have been booked. It was also stated at the Bar that the investigation in the said case is still going on. Thus, the State Police is carrying on with the investigation and no grievance is raised about any lacuna in the conduct of further investigation.

8.4 On a total consideration of the documents on record and the arguments advanced on behalf of the petitioners I am of the view that nothing has been pointed out as to how the further investigation being presently conducted is not inspiring confidence or that it has many loopholes or that the present approach of the investigating authority is biased or partial. On the contrary, paragraphs 6.I and 6.II of the affidavit in reply dated 9.1.2006 filed on behalf of the State clearly shows that the authorities are very live and serious to the conduct of further investigation. Except the narration of developments of the year 2002,

nothing is pointed as a ground for transfer of investigation to the CBI.

8.5 It is required to be noted that by order dated 29th December 2005 this Court had directed taking of sample from each dead body and to send the same for DNA test at Red Hill Laboratory, Hyderabad. The report thereof was also directed to be given to CBI. This was done as per the desire of the petitioners. On further hearing of the petition on 12th January 2006, learned Advocate appearing for the CBI made a statement that the State machinery has cooperated while collecting the samples, etc. and it would further help the CBI in taking the containers to the concerned Laboratory at Hyderabad by deputing responsible officers and infrastructural requirements. The State was therefore ordered to take appropriate decision in this regard and to see that the samples are carried safely to the concerned Laboratory. Paragraph 8 of the said order reads as under:

> "8. It is hereby clarified that earlier this Court and the counsel appearing for the parties were under impression that all the dead-bodies /skeletons were lying on the ground and they have been dug out. But in reality, the deadbodies/skeletons were not on the ground but they were buried and, therefore, the CBI collected the samples by taking out these dead-bodies/skeletons in view of the spirit of the order passed by this Court and the State Machinery has cooperated with the exercise and the petitioners were also present when these samples were collected."

It appears that the DNA report has been received by the CBI in the month of May 2006. Since then the CBI has not taken any action in the matter.

8.6 In the meanwhile, on 23rd October 2003 the Investigating Officer

had filed an application for further investigation in the Court of Judicial Magistrate, First Class, Lunawada. The said application was rejected by the said Court on 18th December 2003. Against the said order a Revision Application has been filed in the Court of Sessions at Godhra, which is still pending. In the meanwhile, as discussed above, the Investigating Officer submitted an application on 22nd September 2004 in the Court stating therein that further investigation is being carried out in the case under section 173(8) of the Code or Criminal Procedure and that during the further investigation, statements of 130 witnesses have been recorded and Test Identification parade was conducted. As a result of that one more charge sheet dated 22nd December 2005 was filed by which two more accused have been booked.

8.7 As far as other similar cases are concerned, the trial Court had acquitted 8 accused persons against which the State has preferred appeals which are also pending before this Court.

8.8 Section 173(8) of the Criminal Procedure Code reads as under:

> "[8] Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence,, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed, and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

In view of this provision the State Police has already exercised such powers and the investigation is in process.

8.9 It will not be out of place to refer to the Central bureau of Investigation (Crime) Manual wherein it is stated that the assistance of CBI can be made available to State Police Forces only on request on the part of the State and in the present case the State has not deemed it fit to make such a request. Clauses 1.13 and 1.14 of the Central Bureau of Investigation (Crime) Manual which read as under:

> 1.13 The services of the CBI are available tot he States in taking up investigation of certain specified categories of serious offences having ramifications in more than one State. Matters relating to such cases requiring attention at the CBI Headquarters may be referred to the local Branch of the CBI which, in turn, will inform the Joint Director concerned or the Special/Additional Director concerned or the Director, CBI, as the case may be.
>
> 1.14 For success in investigation of cases, it is most essential that a decision as to which agency is to investigate, be taken very quickly. References about cases to be entrusted to the CBI should be made as soon as possible by the State authorities. Similarly cases which the CBI feels should be handled by the State Police/Anti-Corruption or Vigilance set-up may be entrusted to them without delay. In case of any difficulty or disagreement,t he matter should be settled at a higher level between the State DGP and the Director, the Special/Additional Director or the Joint Director concerned in CBI."

In the present case there was no request from any quarter to entrust the case to CBI nor the State has found it fit to entrust the same to CBI as the State Police has been inquiring into the matter properly. Therefore, at this belated stage no useful purpose would be served by handing over the investigation to CBI.

9.0 From the aforesaid facts, the only conclusion that can be arrived at is that the State has pursued the matter and is still pursuing the same. On overall consideration of the facts of the case I am of the view

that the petitioners have not pointed out anything from the record that the State machinery has utterly failed to investigate into the matter properly. On the contrary the circumstances narrated hereinabove show that State has actively participated and assisted in the proceedings of sending the samples for laboratory test, etc. The mere conjecture or surmise on the part of the petitioners cannot be a ground to transfer the investigation to CBI. Apart from that, if there is inaction on the part of the police, the petitioners have other appropriate remedies. Further, merely because the alleged incident has generated immense amount of public interest or a public outcry would not be a good ground for transfer of the case to CBI.

10.0 In the above connection, the Apex Court in the case of All India Institute of Medical Sciences Employees' Union (Regd.) Vs. Union of India and Ors., reported in (1996) 11 SCC 582 has observed to the effect that when the petitioner does not adopt the procedure provided under the CrPC for redressing his grievance of the complaint before the competent authorities, he is not entitled to approach the high Court by filing a writ petition and seek a direction to conduct an investigation by the CBI, which is not required to investigate into all and every offence.

10.1 Further, in the case of Popular Muthia Vs. State represented by Inspector of Police, reported in (2006)7 SCC 296, the High Court having found the action on the part of the investigating officers in leaving out certain names from the array of the accused as deliberate and willful, gave various directions including the direction to CBI, CID to take over the matter and re-investigate and prosecute those persons. It was with reference to the said peculiar facts relating to faulty investigation that the Apex Court in para 48 of the judgement observed as under with

reference to the powers of the High Court.

> "48: ... High Court should have been circumspect in exercising the said jurisdiction. When a power under sub-section (8) of section 173 of the Code of Criminal Procedure is exercised, he court ordinarily should not interfere with the statutory power of the investigating agency. It cannot issue directions to investigate the case form a particular angle or by a particular agency. In the instant case, not only the High Court had asked reinvestigation into the matter, but also directed examination of the witnesses who had not been cited as prosecution witnesses. It furthermore directed prosecution of the appellant which was unwarranted in law."

10.2 In the case of State of Karnataka Vs. Arun Kumar Agarwal and others, reported in (2000)1 SCC 219 the Apex Court held that the High Court was not justified in directing the State Government to get an investigation done through CBI when neither specific crime nor persons involved in the crime nor place of crime is known.

10.3 In the case of Samji Ladha V. State of Gujarat, reported in 1998(1) GLH 992 it has been held that the High Court has no power to direct the CBI to hold any enquiry invoking the powers under Article 226 of the Constitution of India. In the case of State of West Bengal V. Sampat Lal, reported in AIR 1985 SC 195, the apex Court held that the appointment of Special Officer with a direction to inquire into the commission of offence can only be on the basis that there has not been a proper investigation.

10.4 In the case of Gangadhar Janardan Mhatre V. State of Maharashtra, reported in (2004)7 SCC 768, it is held that when there are serious allegations about competence and fairness of not only the

investigating officers, but also of certain judicial officers, under Criminal Procedure Code the Magistrate is entitled to take cognizance even if the police report is to the effect that no case is made out against the accused. It is further held that when no action is taken by the police on the information given to it, the complainant has power under section 190 read with section 200 CrPC.

10.4 In the case of Munnalal V. State of UP, reported in AIR 1964 SC 28, it is held as under:

> "7. Two points have been urged on behalf of the appellant and it is said that in view of those points the trial was illegal and should be quashed. In the first place, it is urged that the investigation was irregular and not in accordance with S. 5A of the Act. Section 5A lays down, that no police officer below the rank of a Deputy Superintendent of Police shall investigate any offence punishable under the Act outside the presidency towns without the order of a Magistrate of the first class. What happened in this case was that originally the entire investigation was done by a sub-inspector of police and thereafter the case under Ss. 409/406 of the Indian Penal Code was instituted against the appellant, his brother and the Executive Officer. That case was later withdrawn and it was thereafter that sanction was granted for the prosecution of the appellant and his brother under S. 5(2) of the Act and investigation was made as required by S. 5-A. But the evidence shows that this investigation merely consisted of this that the duly authorised investigating officer went through the papers of the earlier investigation and decided to file four prosecutions as already indicated on the basis of the earlier investigation. It does appear from these facts that though the letter of S. 5A of the Act was complied with its spirit was not, for in reality there was no investigation by the officer authorised under that section and the real investigation was by a sub-inspector of police who was never authorised. In H.N. Rishbud v. State of Delhi, 1955-1 SCR 1150; [(S) AIR 1955 SC 196] this

Court held that “S. 5A is mandatory and not directory and an investigation conducted in violation thereof is illegal”. This Court further held that

“If congnizance is in fact taken on a police report in breach of a mandatory provision relating to investigation, the results which follow cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice.”

It was further held that

“an illegality committed in the course of an investigation does not affect the competence and the jurisdiction of the Court for trial and where cognizance of the case has in fact been taken and the case has proceeded to termination the invalidity of the preceding investigation does not vitiate the result unless miscarriage of justice has been caused thereby.”

In view of this decision, even if there was irregularity in the investigation and S. 5A was not complied with in substance, the trials cannot be held to be illegal unless it is shown that miscarriage of justice has been caused on account of the illegal investigation. Learned counsel for the appellant has been unable to show us how there was any miscarriage of justice in these cases at all due to the irregular investigation. As a matter of fact on the alternative case put forward by the appellant, the substance of the prosecution case was practically admitted by him and he merely pleaded certain mitigating circumstances. Learned counsel for the appellant however drew our attention to State of Madhya Pradesh V. Mubarak Ali, AIR 1959 SC 707. In that case an objection was taken before the trial began before the Special Judge that the investigation had been carried on in breach of S. 5A of the Act. The matter went before the High Court and it directed that in order to rectify the defect and cure the illegality in the investigation, the Special Judge should have ordered the Deputy Superintendent of Police to carry on the investigation himself while the case remained pending in the Court of the Special Judge. That order

> of the High Court was brought in appeal to this Court, and the appeal was dismissed. This case in our opinion is of no assistance to the appellant, for there the objection was taken at the earliest stage before the trial began and it was in those circumstances that the trial was stayed till proper investigation was completed and a proper report made thereafter for the prosecution of the accused of that case. In the present cases no objection was taken at the trial when it began and it was allowed to come to an end. In these circumstances, the ratio of Mubarak Ali's case, AIR 1959 SC 707 cannot apply and the decision in Rishbud's case, 1955-1 SCR 1150; [(S) AIR 1955 SC 196] would apply. The appellant therefore cannot say that the trial was vitiated unless he can show that any prejudice was caused to him on account of the illegal or irregular investigation. We have already remarked that no such thing has been shown in this case; nor was it possible to show any such thing in view of the alternative defence taken by the appellant. We therefore reject this contention.

12.0 Various authorities have been relied upon on behalf of the petitioners i.e. State of Bihar and another V. Ranchi Zila Samta Party (supra), Mohan Lal Sharma V. State of UP (supra) in the case Central Bureau of Investigation Vs. State of Rajathan (supra). However, I am of the view that none of the said decisions is relevant to the facts of the present case. Even though in the case of CBI V. State of Rajasthan (supra) it is held that in certain cases the Supreme Court and High Court can direct CBI to conduct investigation into any offence, it was clarified that such power has to be exercised sparingly.

13.0 It is required to be noted that strong reliance has been placed on behalf of the State on para 3 of the affidavit in sur-rejoinder dated 21.2.2006, which reads as under:

> "At this stage, I would like to point out that the sole purpose of filing the captioned writ petition, in my humble submission, appears to be unnecessarily publicizing, sensitizing and reviving the fading issues, which are otherwise being given hiatus and/or being under active consideration in various pending proceedings and thereby tarnishing the image of the state and its machineries. This suggests nothing but oblique motives of busybodies, meddlesome interlopers or officious interveners desirous to have personal gain of private publicity with a view to dragging in innocent persons by making false, frivolous and malicious allegations. In my humble submission, this conduct on the part of the petitioner No.2 deserves to be curbed by this Hon'ble Court."

14.0 This court does not find any specific denial of the above allegation by petitioner no.2. That apart, when the present matter was subjudice and when this Court was yet to discuss the DNA report, it is noticed that the same was discussed and commented upon in press, by calling press conference on the previous day i.e. 7.12.2006, publishing in all leading daily newspapers, and discussing the matter which was subjudice, which conduct in fact supports the above allegation. This Court takes a very serious view of the matter and since this being for the first time by the petitioner no.2 before this Court, no further actions are directed. It is expected that respondent no.2 shall not repeat the same in future.

15.0 At this stage it is required to be noted that in the order dated 29th December 2005 passed in these proceedings this Court, in paragraph 5, as under:

> "5. Without entering into the detailed discussion, the Court is of the view that such a task should not be handed over to the Court Commissioner. If the say of the State is accepted and finding recorded by Red Hill Laboratory,

Hyderabad corroborates the stand taken by the State of Gujarat, then State Government and its officers who had performed their duties including the local-self government, doctors who have performed post-mortem etc., would touch the point of the highest transparency, but if things, for the sake of arguments are found otherwise, then the Court has scope to pass appropriate further orders in the interest of justice. In this fact situation, ultimately the CBI is asked to undertake that task, that would not prejudice in any way either the State administration or the morale of the police because at present by way of interim arrangement, they have to perform the duties as intervener because in their presence, remnance of each body taken out shall be taken, sealed and send to Red Hill Laboratory, Hyderabad. Ld Counsel Mr.Tirmizi appearing for the petitioners states that all the close relatives who can have DNA testing of the deceased are ready to cooperative with investigation and for blood samples or sample of any part of their body at the instance of CBI which can be gathered by the doctors or responsible officers of the State and can be sent for analysis to Red Hill Laboratory, Hyderabad. The finding in turn will throw light directly or indirectly on the allegations made by the petitioners in the present petition. It may unveil the attempt if is made by anybody to tarnish the image of police or administration. It is true that CBI can be said to be a third agency, but ultimately, it is yet to be traced out whether the bodies that have been found out are of the persons who were named deceased in earlier incidents and disposed of in accordance with norms and scheme under the Municipalities Act and other norms that are being adopted by the State. But if it is found that dead bodies or any one of such dead bodies is not accounted for in connection with any of two earlier incidents, then it may lead to new case and, therefore, the scope to investigate the crime de-novo qua that is there. I am told that relatives of the persons who are declared missing, have been paid compensation, but that by itself would not be sufficient to resolve the situation that has come to light by act of digging out the bodies already buried earlier by the State machinery or municipality concerned. CBI, on receipt of the report from laboratory, after approaching this Court can positively take appropriate further steps, if required. (emphasis supplied”

According to the petitioners, the aforesaid observations are to be read only in the manner which would enable CBI to approach this Court for the purpose of handing over the skeletons of deceased-victims to their relatives. In my opinion, such an interpretation by the petitioners is totally misplaced since the same is not borne out from the plain reading of the entire interim order dated 29.12.2005. However, it is required to be noted that after receipt of the report from laboratory, it was open to the CBI to take appropriate further steps.

16.0 Learned Advocate for respondent No.2 CBI has categorically made a statement that he has no instructions in this behalf. After the report is received if an application is moved for transfer of proceedings by CBI, appropriate orders could have been passed. However, so far the CBI has not moved any application. I am of the view that if such an application is moved by CBI, the same can be considered in accordance with law. Further it will be open to the petitioners to supply any relevant materials to the Investigating Officer since the further investigation as per section 173(8) is in progress.

17.0 Further, the factors which are shown in the petition are general in nature. No material is shown on record to establish any nexus with C.R. No. 11/2002. However, if any material is shown in this regard, the Investigating Officer will consider the same during the course of further investigation.

18.0 To sum up, it is required to be noted that while passing the order on 29th December 2005 the State had accepted the suggestion of carrying out the testing in a laboratory out of State of Gujarat i.e. Red

Hill Laboratory, Hyderabad. At that stage the Court was of the opinion that if CBI is involved as a third agency, there should be transparency in the matter. In pursuance of the aforesaid order the postmortem and investigations were proceeded as per the directions contained in the said order. Thus, the CBI has also participated in the proceedings.

18.1 There is no contention that the State Police has refused to assist CBI nor has the State Police conducted the investigation in such a manner which would cause prejudice to the petitioners. Even the laboratory testing report was given to the CBI long back and the CBI did not think it fit to move this Court as per the earlier order of this Court.

18.2 The apprehension expressed by the petitioners was only on the basis that in the year 2002 the police had not investigated the matter properly and even today's contention is also based only on the very same premises. As regards the contention to transfer the investigation because of the approach of the police authorities in handling the dead bodies in March 2002, on behalf of the State it was stated that all the bodies in question were in fact identified by the villagers concerned and thereafter they were handed over to Lunawada Nagarpalika for burial as per the provisions of section 87(k) of the Gujarat Municipalities Act, 1963 since none of the relatives had, at that time, come forward to claim the said bodies and hence the provisions of Police Manual with reference to unidentified bodies were not required to be complied with in the present case. This fact was not controverted by the petitioners.

18.3 The other ground urged for transfer of the investigation to CBI in view of DNA report dated 3.5.2006 is also not supported by any reason except the apprehension as stated above. Admittedly the State Police

has actively participated in the investigation and nothing is pointed out that the State Police has acted against the interest of the petitioners or in a partial manner.

18.4 The record also shows that the State Police has acted strictly according to the directives issued by this Court. In fact the State Police is proceeding with the investigation and no grievance is raised about any irregularity in the conduct of further investigation. It is not disputed that the State Police has exercised power under section 173(8) of the Criminal Procedure Code in pursuance of which 130 witnesses have been recorded and Test Identification parade was conducted and one more chargesheet dated 22.12.2005 has been filed by which two more accused have been booked.

18.5 No dissatisfaction about the further investigation has been shown by the petitioners. I am of the view that the petitioners have not succeeded in pointing out that they will not get justice if the State Police has continued the investigation, especially when they failed to point out that even after the order of this Court the State Police has acted arbitrarily. Apart from that it is also an admitted fact that no application has been made to the concerned authority to transfer the investigation setting out the reasons for doing so.

19.0 In view of the overall facts and circumstances of the case I am of the view that if no action is taken by the police authority, the petitioners could have approached the Magistrate having jurisdiction to take cognizance of the offence and the petitioners are not entitled to approach this Court by filing a writ petition and seeking a direction to conduct the investigation by CBI.

20.0 The petitioners have not adopted the procedure provided under the provisions of Criminal Procedure Code for redressing their grievance before the competent authorities and therefore this Court cannot issue any direction to conduct the investigation by CBI. Further, as held in State of Karnataka Vs. Arun Kumar Agarwal (supra), in the present case neither specific crime nor names of persons involved in the crime are stated, and hence no case is made out to transfer the investigation to CBI. I am therefore, of the view that no case is made out to transfer the case.

21.0 Looking to the overall facts of the case, I am of the view that the apprehension and allegations which are leveled against the authority are without any basis especially when the matter is alive and further investigation is in progress. Under the circumstances, no case is made out to transfer the investigation to CBI, and in view of the aforesaid decisions of the apex Court it would not be desirable to exercise the extraordinary jurisdiction under Article 226 of the Constitution of India to grant the prayers made in this petition.

22.0 In the premises aforesaid, this petition is dismissed. Rule is discharged.

[K.S. JHAVERI, J.]

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